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Masters Research Report

**Transnational Commercial Surrogacy in India: An Analysis of the Debates  
on the Draft Surrogacy (Regulation) Bill 2016**

**By**

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## **Abstract**

In recent years India has witnessed a boom in transnational commercial surrogacy that promised an antidote for the apparently growing rates of infertility. The Union Cabinet, led by Prime Minister Narendra Damodar Modi, on the 24<sup>th</sup> of August 2016, introduced and seconded the Surrogacy (Regulation) Bill, 2016. The Bill is intended to regulate the ever-prospering transnational commercial surrogacy industry by - amongst other things- excluding single parents, cohabiting partners, homosexuals, overseas citizens of India and foreign nationals from commissioning surrogacy services. The main objective of this research project was to investigate the ongoing debates about the ban on commercial surrogacy in one of the popular destinations of gestational surrogacy today; India. An interrogation of these debates reveals how they relate to key scholarly debates around the politics of reproduction, gendered bodies, sexuality, Hindu nationalism and shows the way in which legislation can be used as a state tool to reproduce patriarchy, and police sexuality. The research questions the government's impetus in sanctioning a Bill that it claims will supposedly put an end to exploitation of surrogate mothers through a preferred option of so-called "altruistic surrogacy" over commercial surrogacy. The report suggests that with so-called "altruistic surrogacy", the government is imposing on women that they should be reproductive gift-givers and therefore should not claim or expect any payment for loss of livelihood and labour of gestation experienced in surrogacy. Facing an unregulated surrogacy industry, the Indian government has chosen a regulatory mechanism that allows the state to present itself as 'saving' vulnerable women.

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## Chapter One: Transnational Commercial Surrogacy

### 1.1. Introduction to the Study

#### *Transnational Commercial Surrogacy*

“In a hospital room...a Bulgarian woman plans to deliver a baby whose biological mother is an anonymous European egg donor, whose father is Italian, and whose birth is being orchestrated from Los Angeles” (Audi & Chang 2010 cited in Peet, 2016: 171). Reproduction is not what it used to be. Today, the mixture of advanced reproductive technologies, with commerce has produced a global billion-dollar industry: transnational commercial surrogacy. A constantly evolving industry, transnational commercial surrogacy has become part of a globalised medical tourism market. In the last decade the volume of exchanges in transnational commercial surrogacy has continuously grown and currently the industry is believed to amount to approximately one billion dollars (Daniel, 2014). As Western countries place restrictions on the conditions in which ova, sperm and bodies can be used for surrogacy, childless individuals are progressively seeking reproductive preferences internationally. In reality it is such a profitable industry, where there are endless fertility clinics which people can use to undertake surrogacy services (Peet, 2016: 172).

Commercial surrogacy is a type of contract labour that requires the buying of what Twine terms ‘reproductive labour’ of a third party with the intention of conceiving and bringing the baby to term (2011:15).<sup>1</sup> It incorporates in vitro fertilisation (IVF), transferring of embryos, and other types of assisted reproduction. This kind of labour entails the buying and selling - or renting - of the bodily functions of a woman, and procuring the baby, the ‘product’, in exchange for a fee; and as Twine argues, is a gender-specific type of industrial labour (2011:15). In spite of the altruistic intentions that may motivate certain women to become surrogates, it is a form of contract labour that comes with its fair share of problems, such as physical pain, death in some instances, and also intrusive medical procedures (Busby & Vun, 2010:26).

There are two kinds of surrogacy; traditional (wherein the surrogate mother provides the ova and carries the pregnancy), and gestational (where the contracting couple provides the egg and the surrogate only carries the pregnancy) (Ergas, 2013:124). Nearly all laws that govern traditional surrogacy were put in place prior to IVF becoming popular, and lawmakers had not considered the effects of a future that would include gestational surrogacy. As a result, gestational surrogacy is in most cases not regulated, and in most countries due to it ‘falling off the radar’ for policymakers, the majority of whom perceive commercial traditional surrogacy as the sale of babies (Ben-Asher 2009). Commercial and non-commercial surrogacy is not permitted in these countries: China, Sweden,

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<sup>1</sup> Note, however, that this kind of ‘reproductive labour’ is different from what has also been called ‘reproductive labour’ in Marxist analyses of household work.

Germany, Portugal, Bulgaria, France, Italy, Switzerland, Denmark, Spain and some American states. However, some countries have placed partial bans, and these include: Ireland, Denmark, Australia, Israel, Hong Kong, United Kingdom, Canada, Greece, and South Africa who allow gestational surrogacy subject to certain conditions (*Hindustan Times*, 25 August 2016; Pande, 2011:619; Panitch, 2013:276).

Previously, infertile couples who wanted to have children had only two options which was adoption or traditional surrogacy- neither of which ensured that the children were fully genetically related to them. Nevertheless, as infertile couples face many challenges in trying to obtain children through the adoption process, and since some do not want a genetic bond between the surrogate mother and the new-born (as in traditional surrogacy), it has generated a need, and has resulted in more couples turning to commercial gestational surrogacy as a way of fulfilling their desire to reproduce and have children genetically fully related to them (Patton, 2010-11:512). In fact, people are willing to travel from Australia, America and the United Kingdom to India as a last resort just so they can have children that are genetically related to them. Most heterosexual couples would have gone through uncomfortable and expensive infertility interventions in their own countries before choosing India. In addition, commercial surrogacy has also been fuelled by gay couples who are unable to adopt due to legal constraints or discrimination (Rudrappa, 2015:37). Rudrappa (2015) states that in America it is families of colour who are affected by infertility more so than white Americans, yet it is the latter who have greater access to assistance. The racial aspects of commercial surrogacy have therefore become one of the more debated aspects of transnational commercial surrogacy, as poor countries in the South become preferred destinations for white prospective parents mostly from countries in the North (Rudrappa, 2015:38).

This research proposes to explore the debates around transnational commercial surrogacy in one of the preferred destinations for gestational surrogacy today, India, and in particular, will research the recent effort to introduce landmark legislation that would effectively ban commercial and transnational surrogacy. A total ban on commercial surrogacy in no way fits the reasoning used in other types of labour- intensive industries, wherein apprehensions over exploitation cause us to beg for the security of workers. Essentially the Bill in India confines access to surrogacy services to infertile heterosexual Indian couples who have been married for at least five years and in a position to compel a close relative to carry their baby “altruistically” for them (The Hindu, August 26 2016). Academic scholarship on this industry suggests a serious plea to reconsider the frames for understanding surrogacy, in order to steer clear of misdirected legislations. In lieu of the commodification or immorality framework which treats surrogacy as an ‘unethical’ practice and the surrogates as the ultimate casualties, the present empirical reality calls for a more refined analytical frame. Once we have studied the surrogacy industry systematically, we learn to appreciate the uniqueness of surrogacy services in India that are incomparable to any other form of gendered and

non-formal work within the state. Most importantly, for any legislation to effectively deal with the exploitative conditions, it is imperative for one to see the surrogate mothers as labourers, and not just uterus, state resources or stifled victims, in order for them to facilitate and be part of the dialogues and not just be ‘saved’ by a troubled patriarchal state (The Hindu, August 26 2016).

Based on the findings of this current study, the Indian government holds the politically potent belief that the problems enveloping commercial surrogacy will be solved and the defenceless will get back their rights once they stop the unmarried, homosexuals, and foreign nationals from accessing surrogacy services, and obviously, remove the monetary aspect from the equation. By expressing as lawful the wishes and privileges of only married couples the Bill clearly indicates the current Hindu government’s interpretation of parenting and family. This research study examines more closely what the objective is in allowing commissioning parents to meet the medical expenses of the “altruistic” surrogate mothers only. What does this “altruistic” ethic mean for women in the realm of reproduction? Could it be that by endorsing “altruistic surrogacy” over commercial surrogacy, it is an official affirmation that women are supposed to be noble givers of their reproductive labour, and should not be recompensed for loss of livelihood and the incalculable emotional toll and physical labour endured in gestational surrogacy? What should happen then if there is no close relative willing to perform this selfless act? Would one not be punished or shamed for refusing to do that? Can we be so sure that the compulsion of a surrogacy arrangement or the pecuniary measure is weightier than the compulsion of deeply patriarchal family ties, especially in a nation such as India? These are some of the issues that will be explored in this project which relates to the ongoing debates about the state’s wider regulation of women’s bodies, the heteropatriarchal family and fundamentally the nation-state that is largely ethnicised, racialised and sexualised in different ways. I trace the way in which these themes relate to the scholarly debates about the politics of reproduction, gendered bodies, Hindu nationalism, sexuality and discuss in detail how legislation can be employed as a state mechanism to enforce patriarchy, govern and regulate sexuality. In this chapter, I provide a brief background to put into context the political landscape in which this Bill has been proposed. I also introduce the purpose of my study, which is to address what the inclusion of “altruistic surrogacy” means for the state’s wider regulation of women’s bodies, the heteropatriarchal notions of family, and what it signifies for the nation-state.

The second chapter is an overview of all the relevant literature and debates around the issue of commercial surrogacy in the Global South and also beyond the Indian context.

In the third chapter, my interest is in the implications of the Draft Bill’s conceptions of womanhood, family and nation and why the government considers it fitting for women to be “altruistic” surrogates but not commercial donors. I examine how the themes drawn from the media texts relates to scholarly debates over the politics of gendered bodies, reproduction, sexuality and of the law as a state

apparatus for reproducing patriarchy, homophobia, governing and regulating sexuality, and replicating a normative gendered regime. The main body of this chapter is devoted to a critical analysis of key opinions expressed by government officials, feminists, human rights activists, experts and journalists. The final section of this chapter explores what the Indian government has coined “altruistic surrogacy” which appears to dictate appropriate notions of kinship, heteronormative views of sexuality, and a legislation that is deeply patriarchal but expressed through the ‘rescue’ of women from the exploitation of transnational commercial surrogacy. I discuss ‘altruism’ as a problematic concept that is gendered, the bearing it has on surrogate mothers and question if “altruistic surrogacy” should be considered an alternative means of protecting surrogate mothers from exploitation, or will it perhaps produce paradoxical effects that solidify a patriarchal culture and perpetuate gendered moral quandaries. Lastly, I closely examine what I describe as the paradox of juridical patriarchy whereby states introduce policies and legislation meant to protect women from potentially exploitative situations within commercial surrogacy arrangements, which is also noticeable in trafficking, migration, and sex work where women as a population group are controlled and managed for their own ‘betterment’- it raises serious questions, especially about ‘humanitarianism’, and how in the name of ‘saving’ and ‘protecting’ women and upholding their rights, this mode of power ends up doing just the reverse and instead advances a patriarchal agenda. Methodologically, the chapter consists of a thematic analysis of online media texts extracted from English-language blog posts, online newspapers, opinion pieces, television talk shows and online forums from India.

This project contributes to multiple fields through its engagement with the socioeconomic and political participation (or lack thereof) of marginalised, gendered bodies of the Third World within and as part of the globalised world. The discussion around some of the themes that are tied to religious nationalism, sexuality, reproductive labour, and patriarchy and neoliberal ideologies within the scope of surrogacy places it among research in Third World feminist studies. Furthermore, along with speaking to issues within race/caste, gender and reproductive rights, it adds to scholarship on postcolonial affect through its engagement with governance of particular subjects through the politics of ‘rescue’.

## 1.2 Transnational Commercial Surrogacy in India – Background

The first gestational surrogacy case known in India took place in Chennai, in 1994 (Patton, 2010:10). A few years later, an Indian woman, out of desperation to obtain medical treatment for her paralysed husband agreed to become a gestational surrogate for approximately \$1000 (Patton, 2010- 11: 525). India as a case study signifies a particularly fascinating site as one of the pioneers in the developing world that has a thriving industry in both domestic and transnational commercial surrogacy (Pande, 2011). India has since surfaced as a global centre for reproductive tourism, with Anand, a metropolis located in the western area of Gujarat being its principal source. Inasmuch as California may very



well be the first preference for affluent infertile couples looking for gestational surrogate mothers, it is treatment centres like Akanksha found in Anand providing fertility services of a similar standard for a portion of that price that attract more clients (Panitch, 2013: 276). Another reason for the growth spurt in commercial surrogacy in India can be attributed to the media attention it has received. For instance, the Oprah Winfrey show in 2007, in one of its segments documented the Akanksha Infertility Clinic, looking closely at an infertile couple who had travelled to India due to them not affording the surrogacy fees in America. The talk show host depicted the scenario as beneficial to all parties concerned. The commissioning couple were able to come back to their country with a baby through a surrogate, and with the compensatory package the surrogate was in a better position to take her and her family out of deprivation (Peet, 2016:178). That segment portrayed Dr. Nayana Patel (the owner of the clinic) as a god of infertile middle income couples who had in turn opened the doors for the “outsourcing of American pregnancies to India” (Peet, 2016: 178). Media attention of this kind has contributed to the growth of transnational commercial surrogacy in the country and the expansion of fertility clinics since 2007 (Peet, 2016).

Commercial surrogacy was legalised in the country in 2002, and from that time it has been reported to bring in revenue worth \$445 million annually (Rotabi & Bromfield, 2012:133). Vincent and Aftandilian (2013:671) report that, by 2012, commercial surrogacy in India had generated more than \$2.3 billion in revenue each year. Such huge profits have been attributed to the high standards of the medical clinics, the monitoring of the gestational surrogates, and the cheap costs in comparison to Europe and America (Twine, 2011:17).

Commercial surrogacy in America is an unnerving process that could cost approximately \$70,000 as compared to India’s fee of about \$12,000 inclusive of medical and surrogate’s fees and with very little legal paperwork. India’s surrogacy structure is quite like California, in which it is privately owned, with third party intermediaries that assess, complement and control surrogacy contracts based on their individual specifications. The consulting rooms in India work at their own discretion and have benefitted significantly from the government’s support of medical tourism. The marketing of assisted reproduction services by the clinics is done through print and electronic media as a way of drawing couples from other countries (Pande, 2011: 619-20).

Carney (2010) underlined disturbing issues within the Indian surrogacy industry. Of concern was the recruitment process used for Indian surrogates. Potential surrogates are poor, mostly illiterate and are taken from rural villages and put into living quarters at the clinics where they are guarded for the duration of the pregnancy. Another troubling issue relates to the recurrent use of Caesarean sections in order to please the commissioning couple, who are at liberty to decide the expected delivery date of the birth of their child that best suits them and in turn benefits the clinic which can ‘schedule’ quick deliveries (Carney 2010:70). Not only are surrogates’ activities closely monitored by the clinics, but it

is also understood as shielding the surrogates from mockery by relatives and neighbours who view the act of surrogacy as dirty or immoral and thus is kept a secret (Rotabi & Bromfield, 2012:133; Qadeer, 2010: 209). Twine points out, and rightly so, that there is an inconsistency that exists here that is often ignored in media narratives of these clinics. Women who later decide to engage in gestational surrogacy arrangements in India live in a country that has been documented as having one of the highest maternal mortality rates in the region (Twine, 2011:17). Furthermore, issues of illiteracy and educational opportunities are built around caste hierarchies. In a country like India surrogacy may very well be the only appealing option for most women who want to complement their husband's earnings. The coercive feature of this type of paid labour is concealed by the fact that the alternatives are employed for ten to fifteen years to earn a similar income. The wage inequality tied with the fact that women with options are not involved in this labour niche is often downplayed by media depictions (Lee, 2009:278; Twine, 2011:18).

At the start of 2009, India purportedly had three hundred and fifty facilities providing surrogacy as part of a wider range of infertility treatments, treble the amount from three years ago (Carney, 2010). An estimate of one thousand five hundred pregnancy trials using surrogates had been made in these clinics by 2009. A third is claimed to have been made from couples outside India hiring surrogates (Mohapatra, 2012: 194). According to Rudrappa (2015:37) there are over two hundred infertility clinics in India that are registered with the National Association for Assisted Reproduction, however, she readily points out that some sources have cited as many as three thousand such facilities.

The Indian government has for some time actively encouraged medical tourism in order to increase foreign currency revenues by providing financial assistance to private hospitals, fast tracking both medical and insurance requirements for a visa and subsidising import tariffs on medical equipment so as to ease infertility and medical travel. Currently, there are no comprehensive laws governing surrogacy. A draft law referred to as the Assisted Reproductive Technology (ART) (Regulation) Bill 2008 was all set for ratification in 2009. But some have argued that the Bill brought forward by the Indian government does not contain the necessary provisions required to protect the rights of surrogates (Vincent & Aftandilian, 2013:672).

The Indian Council for Medical Research (ICMR) made public a draft of the ART (Regulation) Bill for comments and received its initial perusal in December of 2008. The Bill came to being as a result of the *Baby Manji* case in 2008 in which a baby born to a surrogate mother was abandoned and left in a legal quandary when both foreign biological parents had separated prior to her birth. The father was keen on adopting the baby but the legislation in India prohibited adoption by a single father. Both the biological mother and the surrogate wanted nothing to do with the baby. The father was not in a position to take the baby to his home country Japan, due to the Japanese embassy arguing that the

baby would require travel documents from her country of birth; India. In the end, the paternal grandmother adopted the child (Busby & Vun, 2010: 83-84).

The ICMR working within the guidance of the Ministry of Health and Family Welfare concluded in 2005 the National Guidelines for the regulation, overseeing and accreditation of ART Clinics in India after considerable public debate in the country from several stakeholders. Within these rules there was no legislation barring the use of ART by single parents, unmarried foreign women or foreign couples. Subsequently, the draft ART (Regulation) 2008, 2010, and 2013 versions stated to be revised on the recommendations of the Ministry of Law and Justice, have continuously suggested that ART services be accessible to all persons. However, the ART Bill of 2014 has cut short this right and administrative instructions of 2015 have removed this right for foreigners completely and the importation of frozen embryos (Bhattacharyya, 2016; Parry, 14 December 2015; Rudrappa, 2015).

The draft Bill's main stated purpose is to regulate surrogacy services through the ban of commercial surrogacy and its associated 'unethical' practices. As soon as the Bill is debated and passed by both (houses), Upper (Rajya Sabha) and Lower House (Lok Sabha) of Parliament, India will join other countries with complete bans on commercial surrogacy. The draft Bill according to the Indian government, is a spin-off from dialogue between twenty-six states, eighteen ministries, forty stakeholders and several medical practitioners desiring to communicate to the country the ills of commercial surrogacy business and how it is a means of exploiting vulnerable and marginalised women from rural backgrounds (Bhattacharyya, 2016a; Rudrappa, 2015; Saravanan, 2010). The Bill, which the government claims is directed at monitoring the ever-increasing unregulated surrogacy market, includes the banning of commercial surrogacy for cohabiting partners, single parents, homosexuals, foreign nationals and non- resident Indian citizens (Bhattacharyya, 2016:10). It is difficult not to notice the nationalism and a performance of influence by the Modi government with this ban. Bronwyn Parry (2015) contends that foreign nationals no longer represent the largest consumers of surrogacy services in the country but instead it is Indian's own rising middle- class nationals. Within this setting it is clear that while banning foreign nationals is the most politically expedient form of regulation it is probably not the most morally consistent.

Inasmuch as a lot of individuals view surrogacy as parenting and contextualise it in relation to their personal experiences of pregnancies in the milieu of family life, Parry (14 December 2015) points out that it is evidently a type of paid labour for the women. As Pande (2010) argues, most of these women make careful and well-thought-out decisions to participate. Notwithstanding, some do so under the confines of structural violence which affect their life and employment options. The other forms of employment in sectors worse off and badly regulated include domestic work, sex work, and other industries which are not economically rewarding and possibly more dangerous and risky than surrogacy (Pande 2011:618). Parry argues that the racialised and gendered accounts she encountered

concerning surrogates act as obstacles in blocking economically disadvantaged women from holding positions of benefactor to women of a more privileged social status. It may be worth considering who enjoys the benefits from the narrative that holds this power hierarchy in place (Parry, 2015).

Advisory agencies such as the Indian Society of Assisted Reproduction (ISAR) put forward a number of modifications which included thorough and context specific regulations on fertility treatment as well as intensified safeguarding measures and comprehensive contractual agreements for both egg donors and surrogates. Two justices of the Supreme Court of India, before the final ratification of the Bill, were unexpectedly elected to deliberate over the future of commercial surrogacy by welcoming the Indian government to singly ban the practice. The government also made clear its intent to the Court, with an affidavit, to ban and punish all commercial surrogacy services (Parry, 2015). In an industry that has become publicly vilified as commercial surrogacy, the need to take up the moral high ground is strong and the sudden ratification of bans proffers an apparently efficient way by which to obtain it. That said, it is useful and urgent to study closely the narratives that were put forward in India in defending the Modi government's decision. A few were concerned commercial surrogacy is grossly unregulated, that this in turn leads to the psychological and economic exploitation of defenseless women, that the women are being manipulated by affluent foreigners in ways that openly resembled neo-colonialism. While, some sectors of the fertility industry in India are inadequately regulated, even though there are technologically advanced clinics whose services, including surrogacy, are highly regulated (Parry, 2015).

Delhi and Mumbai, home to some of the leading hospitals providing commercial surrogacy services, for instance, is highly contractualised. Scholars have argued that most surrogates do not have the power to manage their own contracts and thus depend on brokers whose association is omitted in the contract itself. In many instances this is true, even though such obscurity is hardly unique to this line of business. Therefore, the contracts would most certainly do with some refinements, an aspect which SAMA (a women's advocacy group) and ICMR had hoped to address in the 2015 Bill. Contracts, however imperfect, to some extent are there to safeguard the protection of everyone involved in the surrogacy contract within the Indian context. A total ban, according to Parry (2015) would drive such negotiations 'off piste', to be managed discretely in societies where power relations are inescapably changed by caste and gendered politics. In the absence of contractual agreements and clinical oversight, commercial surrogacy runs the possibility of being recast as "altruistic surrogacy". This comes across as sensible, and possibly even virtuous, however, it will most likely leave unprotected, surrogates without autonomy and access to power or correct information to even more daring forms of hidden force (Parry 2015).

Sharma, Mittal and Aggarwal (2009:78) make the apt observation of how fertility assistance for which India is now internationally renowned, is privatised, expensive and does not seem to benefit the 8 to

10 million native couples estimated to be infertile. These impoverished, childless individuals are in essence exiled from the realm of assisted reproduction, which appears to be accessible only to Euro-Americans with comparative class privilege (Widge, 2005:228). In a study conducted by the Confederation of Indian Industry (CII) it approximated that in 2012 almost ten thousand international clients had come to India for fertility assistance, and that out of this number, nearly thirty percent were either unmarried or identified as queer (Krishnan, 2013). Currently, however, single and gay couples can no longer have access to reproductive assistance in India, apparently to ensure the rights of the surrogate. The SAMA Resource Group for Women and Health, with several other critics, observe that the ART Regulation Bill, 2013, is more discriminatory than before. The section against gay couples in the draft Bill has been seen as unfair, unsubstantiated, and an infringement of rights to 'equality, freedom and reproduction,' purports SAMA (Dhar, 2013). Furthermore, SAMA - has continually denounced the Bill as being too market friendly to the detriment of the rights of those it claims to want to protect- that is, the surrogate's rights (Dhar, 2013). A robust debate has thus already been generated in India regarding the government's attempt to ban commercial surrogacy. Parry maintains that the probability that a ban on commercial surrogacy will put an end to the practice is farfetched at best, and further states that even if the practice is banned in India it will simply start in another country, transferring the inequities that exist in one country onto the next (2015).

### 1.3 Rationale for Study

When examining the Bill, what is particularly important to this research is how this draft Bill tackles the exploitative conditions in which the surrogate finds herself. To what extent is the gestational carrier considered a worker under the new Bill, or as a national resource in desperate need of saving from a patriarchal state? On the one hand, there is the vulgarity or commodification lens that depicts surrogacy like some sort of deviance and the surrogate mother as a victim. On the other hand, the Bill begs consideration of whether prohibition is the best way to end exploitation. The current study seeks to analyse some of the critical debates taking place concerning the Bill, and to use the debates about the Bill to understand better the political and legal dimensions of transnational commercial surrogacy.

### 1.4 Primary research question

In light of the Surrogacy (Regulation) Bill of 2016 the current study asks:

- 1). What does the complete ban on commercial surrogacy in favour of "altruistic surrogacy", and the current debates both for and against the Bill in India, suggest about the Bill's conceptions of gender, kinship and sexuality?

## Sub questions

- a). What have been the different responses to the Surrogacy (Regulation) Bill 2016 in India, and how do the responses relate to the legal and political dimensions of transnational commercial surrogacy?
- b). What are the sociopolitical and cultural impulses behind the Indian government's desire to introduce the Surrogacy (Regulation) Bill, and how might these motivations create avenues for exclusion and exploitation in relation to the state's traditional forms of family, kinship and belonging?

## 1.5. Methodology

### *Qualitative methodology*

Qualitative methodologies are not limited to a single research approach, but various epistemological viewpoints and pluralism have opened up a number of approaches such as ethnography, narrative analysis, grounded theory and discourse analysis. Qualitative approaches strive to get to “an understanding of a particular phenomenon from the standpoint of those experiencing it” (Vaismoradi, Turunen, & Bondas, 2013: 398). As my study is concerned with meanings and interpretations, a qualitative study involves being attentive not to the objective facts of commercial surrogacy and the Bill, but rather the debates and qualitative meanings that circulate within it.

The study drew on online texts of the processes leading up to the drafting of the Bill, the draft Bill itself, and responses to it in English-language blog posts and opinion pieces in Indian newspapers, debate forums in India comprising feminists, academic scholars, non-governmental organisations, and the general public's views. The time line for the coverage of the Surrogacy (Regulation) Bill was from when it was made public, on the 24<sup>th</sup> of August 2016 to October 2017. Focusing on the online texts captured some of the important debates around the draft Bill and provides an opening into the kinds of reactions, thoughts and ideas being debated which speak to some of the intersecting issues on gender, caste, class, religion, and sexual orientation.

### *Thematic Analysis.*

The research will use thematic analysis approach as a qualitative method. Thematic analysis is a specific method for encoding qualitative information, and entails an ‘explicit’ code which can include a number of themes; an elaborate model of themes, pointers and qualifications which are causally connected or may be found amongst these forms (Boyatzis, 1998:5). The coding process as Coffey and Atkinson (1996:27) state may be understood as a means of connecting the data to our ideas concerning these data. This approach has a couple of intersecting or different uses as it may be utilised as a form of making sense out of seemingly unrelated material, to analyse qualitative information, as a means of methodically observing an individual, relations, setting, and or culture (Boyatzis, 1998:6). I have not used thematic content analysis in this structured form. Instead, I

collected all the documentary material I was able to find in English regarding the Draft Bill. I then adapted a method in which I analysed this textual material by identifying common threads in the debates to generate a list and map of themes. This thematic analysis assisted me in clarifying the structure, content, and conceptual stakes of the debate on the Draft Bill. The thematic analysis is also the basis of the structure for communicating the observations, findings and interpreting the meanings emanating from the critical debates taking place on the various online sites aforementioned concerning the draft Bill.

The objective of using this adapted method has been to provide a more nuanced and comprehensive understanding of the metaphors and meanings that exist currently and can be seen as shaping the discussions around surrogacy in India. In using a thematic analysis approach the research maps the content of the debates from the time the Surrogacy (Regulation) Bill was made available to the public with its intention to ban commercial surrogacy and limit the services to Indian married couples who have been trying to have children for five years but have failed and now have the option to use surrogate mothers that are closely related to them for solely ‘altruistic’ reasons. In analysing the different themes within the debates around the Bill, the research tries to establish what Boyatzis (1998:7) refers to as ‘pattern recognition’ by analysing the meanings of the debate regarding India’s perceptions of sexuality, womanhood, kinship and nation that underpin this concept of “altruistic surrogacy”.

The project seeks to understand why the Indian government, through this landmark legislation that endorses “altruistic surrogacy” over commercial surrogacy, suggests for conceptions of women’s reproduction, the heteropatriarchal family and for the state itself that is largely ethnicised, sexualised and racialised in certain ways.

#### 1.6. Human Subjects and Ethics

Owing to the fact that the paper is a thematic content analysis of the Surrogacy (Regulation) Bill and the debates around it, the research did not involve any interaction with human subjects or participants therefore there are no human subject ethical issues to be considered.

#### 1.7. Limitations

The major limitation to this study is that it summarises the different debates about the Bill but it does not have the direct voices of the surrogates. Also, while it uses textual material, the study is not a discursive or semiotic analysis. The purpose of this report has been to first summarise the existing debates, and to categorise thematically their discussion of the conceptual stakes of the Draft Bill in India. It has not been possible to offer a more discursive reading of exclusively textual material, and I recognize that as a limitation. Finally, the fact that I use textual material only in English and available

online (for lack of resources and linguistic facility) does present only a narrow slice of the debates in India on the Bill, and reflects that narrowness, including its potential biases.

## **Chapter Two**

### Literature Review

#### *2.1. Commercial Surrogacy in a Globalised World*

In the last four decades, developments in reproductive technologies have stirred intense moral, ethical and legal controversies within the international community. Human reproduction has been understood to be a private and intimate matter with multiple social religious and political connotations. As in various areas of scientific progress, the science of assisted reproduction is growing in leaps and bounds ahead of the law (Davis, 2012:120). Rotabi and Bromfield (2012:132) state that in attempting to address the challenges of infertility there has been a shift in terms of social conscience around strategies which include surrogacy in which in vitro fertilisation is normally used. Moreover ‘fertility tourism’ has turned into a profitable business in nations with fairly relaxed assisted reproductive technology (ART) laws such as the Ukraine, Thailand, India and some states in America (Davis, 2012:121). Surrogacy, Teman (2010) points out, is a combination of varying emotions in which a woman - through strategy and science – assists another woman in becoming a mother. She argues that as more women put child bearing on the back burner, high infertility levels, same sex couples and single people pursuing other options of building a family, not only has surrogacy become a preference but it has increased rapidly (Teman, 2010:1).

Teman (2010) and Dillaway (2008) claim that there has been a significant interdisciplinary academic inquiry into surrogacy arrangements, inciting a nuanced and complex debate concerning the ethical, legal and wider social issues that these arrangements bring to the fore. Most of this academic work Teman (2010:2) and Mohapatra (2012:191) maintains, displays a level of discomfort with regards to surrogacy, raising issues about class and gender-based oppression of the bodies of women, the commodification of women and children, the distortion of nature, and the degrading of human life and of women’s reproductive labour. Mohapatra (2012:192) implies that transnational commercial surrogacy has been well received because of the weak international regulations on such arrangements and the advancements in technology which has made room for gestational surrogacy over traditional surrogacy. Mohapatra (2012:193) defines surrogacy “as an arrangement in which a woman agrees to become pregnant and delivers the baby for another person or couple to raise”. The surrogate’s ova may be utilised which makes her the baby’s genetic mother (traditional surrogacy) or can be implanted with a donor’s fertilised ova (gestational surrogacy) (Pande, 2009: 143). In light of commercial surrogacy, the surrogate is compensated for her service, when it is done for altruistic



reasons, either by donating eggs or gestation, the surrogate does so as a form of a gift (McEwen, 1999:276). Ruby Lee (2009:275) observes that the practice of traditional surrogacy has in fact been replaced by gestational surrogates out of a desire for intended couples to by-pass the legal controversies such as those witnessed in the Baby M case. An example illustrated by Lee (2009:277) is the burgeoning numbers of infertile couples from America who are flying to India to hire the services of gestational carriers for a portion of what would be paid in their country of origin. It is worth noting that gestational surrogacy according to Rudrappa (2015:3) is more prevalent in India and elsewhere because of the non-genetic tie between the baby and the surrogate carrier and therefore there are very few legal rights over the baby. There are however other reasons why an individual would opt for transnational surrogacy as Mohapatra (2012:198) remarks; it may be that domestic surrogacy is unavailable or that the practice is not open to particular persons due to their marital status or sexual orientation.

India has been named the number one destination for commercial surrogacy (Rudrappa, 2015:4). The Indian government initially had been incredibly unconcerned about the client's sexual orientation and practices, but legislation in 2012 changed that. Rudrappa (2015:5) asserts that as it stands today homosexuals, single persons, and couples that have only been legally married for two years. As of early 2013, Rudrappa maintains that the commercial surrogacy industry in India has been providing services to heterosexual couples within the country, Canada, America, Australia, the United Kingdom, Germany, Japan, and Spain to mention a few. The author emphasises how the sperm used in these surrogacy arrangements is mostly from the commissioning father, whilst the ova can be obtained from a different source (Rudrappa, 2015:6). A number of the procedures involved in surrogacy are facilitated by money. Commissioning couples purchase the ova or sperm and rent a surrogate carrier who receives compensation for her gestational services (Rudrappa, 2015:3). These commercial surrogacy markets provoke a series of questions. What are the implications of getting into a surrogacy agreement where payment is made in exchange for a baby? What is being bought and sold exactly? What really is the relationship of the surrogate to her own body if it can be hired out for gestating? What does it imply for a surrogate to get paid for such labour? What selection process is used in hiring Indian women into becoming surrogate mothers? What pushes individuals to look for other women to bear children for them half- way across the world? How are the market transactions negotiated with regards to the buying of ova, and the hiring of surrogates?

## *2.2. Commercial Surrogacy: Debates and Precedents*

ART is the technology that is employed to get pregnant through medical intervention like in vitro fertilisation and surrogacy, amongst others. Merrick (1990:161) contends that at first glance surrogacy agreements appear as though they are the perfect resolution for infertile couples who wish to have an

offspring that is genetically related to them, yet there are however important social, ethical, and legal concerns that demand an analysis of this solution. McEwen (1999: 294) asserts that surrogacy has received a lot of scrutiny in Europe and America since the Baby M case. In the case of Baby M in 1987 an American court deliberated on a surrogate motherhood arrangement. The contract stipulated that Mary Beth Whitehead would be implanted artificially with the semen of the natural father William Stern, who would recompense the surrogate ten thousand dollars once she had given birth. Upon the baby being born Whitehead chose not to notify the hospital about the surrogacy agreement and listed her own husband instead on the birth certificate. Stern was not allowed to take the baby home as there were no records indicating that he was the father. The surrogate mother later gave the child to the Sterns only to decide a few days after that she was in fact going to keep the baby. The Court established that a voluntary surrogate agreement without payment was not in violation of current legislation in as far as the surrogate mother was not forced to give up her baby. Nevertheless, the surrogacy arrangement in this case was unlawful and unsound as it went against this criterion (McEwen, 1999: 278-9). The challenge McEwen brings out is the socioeconomic divide that exists in surrogacy, as the Baby M case demonstrates a clear example of inequality in economic backgrounds between both parties in the surrogacy arrangement (McEwen, 1999: 294). Spar (2005:288) declares that what occurred during the Baby M case was simply transactional in that Mr Stern compensated Mrs Whitehead, which raised difficult political and social questions.

### *2.3. Transnational Commercial Surrogacy and Race*

Banerjee (2010: 107) asserts that surrogacy has transformed as it operates outside borders in relation to globalisation. According to her it is taking place transnationally and is advertised to first world countries as a lucrative package of reproductive tourism mostly by numerous clinics and organisations in the global south (Banerjee, 2010:108). McEwen has observed that couples who make use of surrogacy services are predominantly rich, white, and so are the surrogates they pick in traditional surrogacy arrangements (1999:295). The author suggests that in the event traditional surrogacy is the option chosen, the commissioning couple would be reluctant to choose a woman from an impoverished background out of fear that her health could most likely affect their baby's too (McEwen,1999: 295). In addition, as indicated by Harrison, (2014: 146) one would find that couples would prefer to hire surrogates of a different race as gestational carriers, firstly because women of colour are more willing financially to be surrogates, and secondly the surrogate is not the genetic mother. Dillaway makes the case that the persons who are privileged by class or race can maintain this position through the use of surrogacy, and those who have to deal with racial and class prejudice can only assume a lesser role in society when engaging in surrogacy arrangements (2008:304). She also indicates that surrogacy fosters social interaction between women from different classes and castes to form relationships and bonds that otherwise would not have been possible but due to the privileged

woman's 'helpless' position she seeks the assistance of a poor woman to hire her womb (2008:308).

Sandra Harding (cited in Bailey, 2011: 716) suggests that the Baby M case may have drawn the public's attention to the way in which poor brown bodies' wombs have been used to produce offspring for rich European American couples. Harding's inference matches a claim made by Gena Corea in her book *The Mother Machine* which predicts a world in which uteruses of disposable women are employed as incubators for the foetuses of rich women (Corea, 1985: 276). Bailey maintains that middle class and wealthy couples from first world countries go to fertility centres in Thailand, Ukraine, Russia, and India for significantly cheaper services (2011:716). What is more, Bailey (2011) cites that a great number of experts; legal, psychologists, ethicists have grappled with the interpretations and undertones of the surrogacy practice, particularly when it involves money.

Pande (2009b) notes that most of the surrogacy cases in India involve gestational carriers where there is no genetic tie between the baby and the surrogate. She indicates that in the case of traditional surrogacy, whereby the surrogate was genetically the baby's mother, incited significant ethical and legal problems for the intended parents as the mother possessed more power over the baby than its intended mother (Pande, 2009b: 142). The use of in vitro fertilisation (IVF) in surrogacy Pande believes seems to rectify the problem. For the sociologist this also meant that a distinction could be drawn between the genetic mother and the surrogate and legally, this separation was a determining factor - in that the bond between the baby and the surrogate would mean very little than it would under traditional surrogacy (Pande, 2009b:143). Commercially there was an increase in both ova donors and surrogates (Pande, 2016).

Ragone (1994) and Spar (2006) demonstrate how women were much more willing to participate in egg donations if it did not involve undergoing pregnancy and were more open to being surrogates if the baby they would carry was not connected to them genetically. The fact that everything was divided into components, for instance the wombs and ova, not only enabled the market to flourish but also transformed it. Pande states that the commissioning couple were in a position to dictate the perfect genetic material they were looking for such as intelligence, race physical characteristics and did not have to worry about the gestational surrogate's genes. Unsurprisingly, this form of surrogacy opened up the market to becoming transnational. It was now possible for a Japanese couple living in Florida to request the services of a surrogate carrier residing in a remote area in western India to carry a baby for them (Pande, 2009b: 144).

Cooper and Waldby (2014: 64) contend that transnational commercial surrogacy is usually a profoundly racialised practice that depends on class difference between the surrogate and the commissioning couple so as to establish a kinship based on a genetic bond. In cross-racial gestational

surrogacy agreements a gestational carrier is ideal as she does not contribute any genetic link, thus her ethnicity cannot be found on the baby as such whiteness is easily reproduced economically at a cheap price. In analysing the racialisation of surrogacy, inequalities in economic privilege shows how beliefs of race and kinship are important to the commissioning couple (Harrison, 2014: 146). This in turn highlights the means utilised to assimilate and rationalise a commercial transaction that is rife with inequity (Cooper & Waldby, 2014:65).

#### *2.4. Ethics of Money and Exploitation in Commercial Surrogacy*

McEwen (1999:272) maintains that the surfacing of new reproductive technologies has brought with it alternative solutions for infertile women, along with women who are prepared to bring a new life into the world for another, and for third parties keen on catalysing the meeting of these two people for a profit. McEwen acknowledges that this technology has required that societies rethink traditional views concerning the inception of life and the identity of the biological mother. As a result McEwen believes it has motivated critical debates around the ethics of financial compensation to women prepared to give birth for others and the probabilities of exploitation through these payments (1999:272). The author points out that where a commercial surrogate is paid for either ova donation or carrying the foetus to term, the surrogate doing it for altruistic reasons does so as a gift (McEwen, 1999:276). Lee (2009:278) contends that the relatively insignificant amounts paid by American couples raises ethical concerns, demonstrating that outsourcing for Americans is no longer confined to manufacturing and cheap labour, but has diversified to include women's biological and reproductive bodily functions.

Two positions claim that gestational surrogacy is commercialisation and exploitation (McEwen 1999). The first is the general opposition to any surrogacy contract, where the surrogate takes 'any' kind of payment for services rendered. The second is a concern around exploitation, where a surrogate lacks agency due to her low economic status and compensation for her labour. McEwen (1999: 286) contends that a dearth in global policy monitoring transnational surrogacy agreements, coupled with different guidelines found in particular states increases the probability of injustice and overstretching in the practice. Some scholars argue that the exploitation actually starts before the surrogate arrangement is actually contemplated because the brokers in the industry prey on the emotional character of the people by fostering a belief that babies with the same genetic makeup as their parents are more important than those who are not. This line of thinking in a capitalist society has led to the creation of a growing market of both surrogates and infertile couples. The counter argument to the commercialisation of surrogacy is that the money given to the surrogate after carrying the foetus to term and a live birth is not for the child or surrogate's womb but rather a compensatory package for her services in gestation and for undergoing labour (McEwen, 1999: 290-2).

Suze Berkhout (2008:95) claims that the culture of commercial surrogacy deals with surrogates in ways that represent forms of objectification which undermines the surrogates' autonomy. The commissioning couple treats the surrogate as an object or tool that produces an offspring that is genetically related to at least one of them. The notion of autonomy defended by feminists in support of commercial surrogacy, Berkhout argues, strongly depends on the idea of self-legislation pertaining to one's actions, especially those regarding one's body (Berkhout, 2008: 96, 98). She establishes that surrogate mothers should be actively involved in the decision making that affect their lives, yet a power dynamic is evident between the surrogate and the commissioning couple, given their relative social standing, the binding and socially determined limitations on the surrogate and the high expectation to produce a healthy 'commodity' (Berkhout, 2008: 103). By expecting that the surrogate mother consent prior to the insemination that she will adhere to appointment schedules, subject herself to medical procedures and observe any other instructions during the gestational period, shows the extent to which the surrogate's agency is restricted. Whilst the needs, experiences, beliefs of the intending couples, medical practitioners, and the broker's staff are taken very seriously, Berkhout asserts that the typical surrogacy agreement demonstrates that the surrogate is deemed fungible. In the event that the artificial insemination fails after a period of at least six months, the surrogate is taken out from the programme and the intending couple starts the process with a new surrogate. Should the surrogate lose the baby there is no compensation and the commissioning parents decide if they wish to take their chances with her again. According to Berkhout fungibility means that the surrogate absorbs all the risks and the onus is on her to adhere to the fertility clinic's rules and to suppress her demands in negotiation. Wrongful dismissal unfortunately does not apply in the surrogacy business as one would find in a standard workplace scenario where other types of labourers are protected (Berkhout, 2008: 108-9).

Vida Panitch (2013:331) raises the Justice Condition requirement to determine if a transaction benefits each party (the surrogate and the commissioning couple) relative to where each of them started by making a comparison of the two. The Justice Condition looks at whether the distribution of harms and benefits has been shared equally and does not privilege one party and is unfair to the other. With regards to transnational surrogacy contracts, we need to probably evaluate the satisfaction of this condition on the premise of whether the surrogate is under paid in comparison to the advantages the commissioning couple enjoy (Panitch, 2013). In order to do so, Panitch suggests that the comparison should be about the fairness of the benefits inter- contractually and not only intra- contractually. The idea is to establish if the susceptibility of a particular group to an exchange is being manipulated as a basis for not granting them what a less helpless group, providing the same service in another topographical location as a trade-off for their services (Panitch, 2013: 332). Previous studies by Busby and Vun (2010:40) revealed that the surrogates in America choose to carry babies for others not because there are no other equally paying jobs but instead this form of work provides them the

opportunity to help others. They noticed that the benefits they enjoy do not go unnoticed from a grace period shortly after giving birth, reimbursement for expenses, an opt out clause, the best medical care, legal support and the chance to have a connection with the baby and its new parents (Busby & Vun, 2010:41).

Amrita Pande's study (2009b, 2010) revealed that in India, the surrogate carriers are in an age range of between eighteen and forty-five, with a basic education and mostly unschooled, have a family, and can expect a compensatory package of between one thousand five hundred to five thousand dollars. The surrogates are put up in dormitories where what they eat to what they do is monitored closely and they cannot go as they please except with permission from the medical staff. According to her findings the surrogates in India come from extremely impoverished backgrounds and are poorer than their western counterparts and the income they receive from surrogacy is not available to them through other types of work where they live (Pande, 2009b, 2010; Twine, 2011). Pande discovered that these surrogates have no legal aid and their rights are non-existent in the contract, neither do they have a post-birth grace period if they have had a change of heart; and there is no payment without a baby (Busby & Vun, 2010; Pande, 2010, 2015). What motivates the Indian surrogates to engage in surrogacy arrangements according to Gupta (2012: 46) is almost purely financial and their choice to do so is for the most part made in an environment with stifled possibilities of expressing themselves, growth, unemployment, abject poverty and patriarchal social and family structures.

Pande (2010:163) attests to the mutual relationship between fungibility and the limited bargaining power, as Indian surrogates are unable to negotiate their disposability, and so they choose to deny its significance by viewing the whole surrogacy agreement as a gift and attempting to forge relationships with the commissioning couples. Therefore, in trying to regain their dignity, Pande claims the women acted as though their position as workers who should be earning a salary and a fair contract did not matter (Pande, 2010: 164). The surrogates are taught not to view themselves as workers. Panitch (2013:339) contends that on the one end they are encouraged to see themselves as gift giving and on the other the contract is a reminder of their disposability, the medical staff who over-emphasise that they are simply wombs that are replaceable at any time. Pande argues that the surrogates need to understand that they are indeed providing a service by carrying out a form of 'gendered, exploitative, stigmatized labour' (2009b:169, 2015). Pande further states that it is only when society acknowledges transnational commercial surrogacy as work that is prone to exploitation like any other type of work, and at the same time seeing the surrogates as crucial agents that we can start to pull apart this picture of the victim that is always reproduced whenever brown bodies of the global south are in focus (Pande, 2010: 972).

A lax in legal regulation of commercial surrogacy in India, maintains Ryznar (2010) has benefited

those who seek it in the country due to the free market dictating everything from the expenses to the conditions which are all included in the contract between the surrogate and the intending couple. Ryznar (2010: 1018) purports that the market is advantageous to foreign nationals who are likely to afford the somewhat lower costs of surrogacy in the country. In India there is a steady supply of Indian women prepared to serve as commercial surrogates and it ensures that the costs of surrogacy remain low in contrast to those in America. Ryznar makes the inference that the relatively low costs together with the weak legal system have thus placed India as the most sought-after fertility location (Ryznar, 2010: 1019). Krolokke and Pant state that affordability, a medical team that is English speaking, and a small waiting period if any coupled with sightseeing trips has enhanced the country's image not only to non-resident Indians (NRI's) in the diaspora but also foreigners with different sexual orientations and marital status (Krolokke & Pant, 2012: 235-236).

## *2.5. Feminist Critiques of Commercial Transnational Surrogacy*

Feminist scholarship locates transnational surrogacy within the domains of contemporary forms of capitalism, reproductive technologies, and globalisation. These scholars are wary of how pro-choice rhetoric is employed to explain the fact that Indian surrogates get into surrogacy arrangements and question the idea that transnational reproductive sisterhood is mutually beneficial (Majumdar, 2014: 276). Gupta (2006: 34) highlights this concern by pointing out that the transnational feminist scholarship needs to appreciate the reality that one's privileges in the world are forever connected to another person's exploitation or oppression. There has been a shift in the focus of transnational feminists towards looking closely at the manner in which surrogacy engages with neo-colonialism and orientalism by way of exposing pregnant brown bellies to an objectifying western lens and depicting the surrogates in India as good Hindus who are drug and alcohol free and therefore perfect surrogates (Das Gupta & Das Gupta 2010 cited in Krolokke & Pant, 2012: 237).

Boris and Parrenas (2010:3) point out that surrogates and nannies are part of what they refer to as intimate labourers because they are involved in what they have described as low status 'women's work'. According to the authors, intimate labour is generally performed by marginalised women from economically disadvantaged backgrounds and women of colour. Indian surrogates are engaging in intimate labour in bureaucratic structures with almost non-existent relationship ties with the intended parents utilising their labour. Surrogacy in India displays signs of 'intimate' labour articulated by Boris and Parrenas (cited in Harrison, 2014: 147); that is, the 'messiness' of birth, intimacy, class and often the race of surrogate that ends in conflicting expectations between that of nurturing during gestation and the immediate emotional disengagement after birth. The payment surrogates receive for their services in India does very little for them on a macro level and if anything it shows a cultural exchange between the foreign couples and the surrogates that is embedded in structurally uneven

power relations. Some have interpreted the phenomenon of transnational globalisation as a fitting overlap between marginalised and rich women. Ehrenreich and Hochschild (2002) discourage seeing these arrangements as if they were a seamless interaction between interests of each group, arguing that in fact they are brought together in such a way that second wave feminists in first world nations like to take as allies and partners fighting to attain similar objectives. However, they meet as ‘madam and domestic worker’, employer and employee, across a wide margin of entitlement and possibilities (Ehrenreich & Hochschild, 2002:11). Harrison makes the claim that surrogacy is usually uncritically viewed in the same way as being mutually beneficial to both sides. Since the scholarship of surrogacy is embroiled in the narrative of self-sacrifice, the concept of ‘women helping other women’ once more weakens the negotiating position of the surrogates (Harrison, 2014: 154).



## **Chapter Three: Reproducing Patriarchy**

### *3.1. Study and Discussion of the Surrogacy (Regulation) Bill*

Surrogacy poses unusually difficult questions to conventional ideas of “the family”. A constant focal point of legal furor and popular interest, surrogacy and ART’s affect important matters of sexuality, gender, kinship, class, and influence. On the one hand it sensationalises the extent to which some infertile couples are prepared to go in search of a child that is genetically related to them. Conversely, it assists in trailblazing pathways to novel kinship formations, such as same sex biological families. In this regard, surrogacy broadens conservative concepts of reproduction. The rights of women, their equality or reproductive rights may correspondingly be summoned to validate approval and disapproval of the practice of surrogacy (Birenbaum- Carmeli, cited in Birenbaum- Carmeli & Inhorn, 2009:190). In what follows I attempt to trace the diverse messages expressed through the Surrogacy (Regulation) Bill of 2016 after it was cleared by the Union Cabinet of India. This chapter discusses the themes relevant to this current study and examine the public debates surrounding this Bill which has been described by some as puritanical, draconian, ‘anti-liberal’ and has received severe backlash and criticism over the exclusion of certain groups of the Indian society as well as the proposal of a rather problematic categorisation of “altruistic” surrogacy (Ergas, 2013: 16; “We the People”, November 2 2015).

In this chapter, my concern rests in the implications of the debate regarding India’s conceptions of womanhood, family and nation which underlie this notion of “altruistic” surrogacy and why the government considers it fitting for women to be altruistic but not commercial donors. I examine how the themes drawn from the media texts relates to scholarly debates over the politics of gendered bodies, reproduction, sexuality and of the law as a state apparatus for reproducing patriarchy, homophobia, governing and regulating sexuality, and replicating a normative gendered regime. The main body of this chapter is dedicated to a critical analysis of key opinions expressed by government officials, feminists, human rights activists, experts and journalists. The final section of this chapter is a more in-depth discussion of some these debates emanating from the themes found within the media texts. Methodologically, the chapter consists of a thematic analysis of online media texts extracted from English-language blog posts, online newspapers, opinion pieces, television talk shows and online forums from India.

The Bill has revealed what the Indian government prescribes to be appropriate forms of family, sexuality and kinship. The Indian government appears confident that this Bill will address concerns around the exploitative nature of ‘unethical’ commercial surrogacy practices that have for over a

decade remained unchecked. However, its critics have argued that surrogacy should be accessible to anyone and its citizens must be able to exercise their right to procreate and not be discriminated against based on gender, sexual orientation and marital status (Legal Desire, August 29, 2016).

The proposed ban on commercial surrogacy ushers in what Prime Minister Narendra Modi's government calls ethical "altruistic surrogacy" for infertile Indian couples who have been married for at least five years. This clause is likely to have an adverse effect on the domestic market, especially with the growing clientele of same-sex couples who desire to become parents but by law are not able to because their sexual preferences are not recognised and punishable by law. The Indian state may no longer be the number one destination for infertile foreign nationals desiring to be parents. This also raises alarms given that reproductive tourism in India has been reported to bring in revenue worth \$445 million dollars annually since it began in 2002 (Peet, 2016:177). Before we write off clauses of this Bill as draconian and conservative, or flag them down as a pioneering effort by a state to protect its citizenry, let us deliberate a bit on the thoughts behind the Indian government propositioning such changes, given that it impacts a sector projected to be worth \$2.3 billion dollars (Pande, cited in Lundin, Krolokke, Petersen, Muller, 2016:92).<sup>2</sup> The evident response: to dodge transnational legal disputes. The official response: to protect the rights of the child and surrogates, and guarantee that only people in stable relationships can have children through surrogacy (Pande, 2014).

The BJP's External Affairs Minister Sushma Swaraj, has defended the government's position by claiming that they are intervening to 'protect women from exploitation'. This stance was supported at a press briefing led by Swaraj that non-resident Indians (NRI's), foreigners, live-in couples, single parents, and gay couples would be excluded from seeking surrogate services. Swaraj also pointed out that the Indian government does not acknowledge homosexual or live-in relationships, which is why they have been excluded from commissioning babies through surrogacy (Legal Desire, August 29, 2016). Only a blood relative, who is not an NRI or foreigner, is married and has at least one child, can carry a baby once, "altruistically", for infertile family members. The medical professionals have also been prohibited from providing their services for commercial purposes except for so called "altruistic surrogacy". Failing to observe the ban may attract a prison term of ten years and a fine of up to 10 lakh rupees. The draft Bill is only enforceable in India, excluding the state of Jammu and Kashmir (*The Indian EXPRESS*, March 6 2017).

The BJP government, in its benevolently paternalistic fashion, has justified the barring of foreign nationals from commissioning surrogacy as a way of preventing the improper use of this service (*The Indian EXPRESS*, March 6 2017). Limiting surrogacy to only married couples and forbidding others based on their sexual orientation, marital status or age raises issues of gender equality, attempts to

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<sup>2</sup> Note, however that there are no recent figures.

govern and regulate sexuality, and to create ‘pure’ forms of family. Some of the views expressed by the public highlight the fact that constitutionally the state should not be interfering in private matters of which persons can have children, naturally or through surrogacy, or to dictate the modes of parenthood and suggest that the draft Bill should be put to the public before the parliamentarians’ debate it (*The Indian EXPRESS*, March 6 2017). The fundamental rights of stakeholders wanting to commission the services of surrogates are being circumvented with this proposed ban if one were to consider Article 14 and 21 of the Indian constitution which speaks of equality and the right to life before the law (*The Indian EXPRESS*, March 6, 2017).

A prominent female figurehead in the BJP, Soumya Swaminathan, the Director General of the Indian Council of Medical Research in Delhi, who assisted in the drafting of the proposed Bill, has justified its existence by contending that it will put an end to the exploitation of poor and vulnerable women as well as benefit needy infertile Indian couples (*Deccan Chronicle*, August 28, 2016). Swaminathan is convinced that the surrogate mothers come from impoverished backgrounds, and possibly being forced into this line of work by family members who need to get money quickly. She argues that the Indian women were being used as ‘womb rental factories’ by foreign nationals, and is adamant that the government needs to advance this Bill to protect the women (*Legal Desire*, August 29, 2016). However, legal journalist Anuj Kumar points out that although surrogacy is perceived to be an immoral and unethical transaction and often equated to prostitution, it is providing new avenues for poor Indian women, who would otherwise not be able to look after themselves and their families financially (*Legal Desire*, August 29, 2016).

“Altruistic surrogacy” arrangements, according to the Bill, will be regulated and monitored through the establishment of a National Surrogacy Board at a local level, the state surrogacy board and relevant authorities within the State and Union boundaries. This Bill has been described as a modification of the United Kingdom’s altruistic surrogacy provision which permits only ‘blood relatives’ to ‘close relatives’ (*ILN Today*, September 22, 2016). In stating that the surrogate mother should be closely related to the intending couple the bill does not define what that means, for instance, identifying further attributes like the family lineage, the degree of separation, and so forth. It seems as though the male seed is what is of greater importance here, that the sperm is the accepted embodiment for the creation of a child while women are supposed to act like the earth and receive the male seed and bear fruit (Pande, 2014, 2015). Therefore, blood is male and whilst it is unalterable, it is transmitted in the male line and reproductive technologies assist in maintaining this genetic tie. In India family ties are often founded on the twofold notions of patrilineality and patrilocality- lineage follows the male line (Pande, 2014:147). Reproductive technologies in essence strengthen the patriarchal ideology of the genetic bond- the patriarchal focus of the seed (Pande, 2014: 148). Even though the bill seems to pay closer attention to the preservation of the male genetic bond and the use of reproductive technologies ensure this, the notion that there will be close relatives lining up to be

‘altruistic surrogate mothers’ may be misleading much like a similar assumption that was made in relation to the accessibility of organ donors in India which is believed to have been unsuccessful (ILN Today, September 22 2016).

The exclusion of same- sex couples from the bill has received significant criticism and is perceived by some as state policing and surveilling of people’s sexuality. The criminalisation of homosexuality in India over the years for instance, coupled with this exclusion of same-sex couples from commissioning surrogacy services illuminates and reinforces the BJP’s stance on preserving its cultural nationalism (Dasgupta, 2011). The legalisation of homosexuality remains a controversial issue in the country, and until such a time when one’s sexuality is not policed, and homosexuals are free to exercise their rights, the idea of making surrogacy services available to them may be wishful thinking. Live-in couples are just as much at the receiving end as same - sex couples because these live-in arrangements are looked upon disapprovingly in India, (ILN Today, September 22, 2016). This opens a space for the discussion of Hindu nationalism and how government leaders exercise tactical political use of features taken from a religion to piece together an elitist, homogenised, “Other-repressive, ‘cultural’ nationalist ideology” through legislation which enforces normative heterosexuality and the preservation of ‘acceptable’ family formations (Bacchetta, 1999: 141,156; Birenbaum- Carmeli, 2009 :206).

### *3.2. Exploitation*

The Bill is especially ambiguous in addressing the concerns of surrogates as workers and is unclear on such critical matters like the rights of surrogate, details of the contracts, the role of various intermediaries, the nature of “informed consent”, the type of compensation, legal and medical assistance after birth for surrogates. It seems that the conflation of intimate labour – like care work, sex work, and domestic work when conflated with love or family duty has traditionally validated lower wages (Boris & Parrenas, 2010:7). When intimacy becomes labour, it comes to be perceived as unskilled work that anybody can do because women have in the past performed these activities without pay (Boris & Parrenas, 2010:13). Now while the naturalisation of abilities essentially ‘cheapens’ women’s labour, the stigmatisation of the very same labour actually ‘controls’ it (Pande, 2014). In Malaysia for instance, the inflow of rural women into manufacturing industries is seen as being the source of moral decay in Malay-Muslim communities, whereby working Malay women are observed as an “Other invading male public spaces”, the “Other” that ought to be controlled (Ong, 2010:287). The relevance of this to the broader debates around commercial surrogacy relates to the politics of gendered bodies – how women are controlled and surveilled as a group for their ‘own betterment’, and how their biological ability to reproduce should not be driven by greed and money which opens them up to exploitation but instead they should provide this labour for no pay (Jorgensen, 2000: 41).

The exploitation of women within the surrogacy industry, the BJP government claims is the basis for an urgent need to pass the Surrogacy (Regulation) Bill as legislation. Lalitha Kumaramangalam, the Chairperson of the National Commission for Women on a hotly debated television show 'We the People' (November 2 2015) featuring various stakeholders, backed the government's views that the \$2 billion dollar industry has "unfortunately today become an exploitative industry, there are no laws governing the surrogacy industry and as you know in India, we are known for having a lot of laws and regulations but there is always under the table a black market that thrives".

The draft regulation Bill's objective is to put an end to 'unethical' and commercial practices as well as prevent the exploitation of needy women as surrogate mothers. The Bill plainly states that no woman will become a surrogate in exchange for money. Pregnant surrogate mothers residing in a fertility clinic in Anand, Gujarat who were being interviewed by the Hindustan Times newspaper expressed their discontent with this new draft Bill and their intention to write to Narendra Modi protesting the strict clauses in the Bill which they felt was 'anti-women' (*Hindustan Times*, August 25, 2016). Vandana Yusug, a thirty- year old surrogate who carried a child for a foreign couple expresses her dismay by stating that, "They call us baby-making machines. But they will not call us that when we bear our husband's child one after another. For us, there is little difference between the two" (*Hindustan Times*, August 25, 2016). For scores of women carrying a child for a childless couple is seen as a dignified way out of lack and a desperate means of eking out a living. Many of them have asked, 'if there are any other jobs they could find where there would be able to earn lakhs of rupees over nine months, and if they could carry on working and receiving a regular wage, how would they provide for their husband and children's school fees and still put food on the table with an allowance of Rs 5000?' (*Hindustan Times*, August 25, 2016). The surrogate mothers in this instance, strongly believe that if their government's concern is about protecting needy women from exploitation, then perhaps it should ensure substantial compensation for the surrogates – they should be paid more (*Hindustan Times*, August 25, 2016). Indian women, who have employed the services of surrogate mothers, perceive that limiting surrogacy to "altruistic surrogacy" only closes the doors on infertile couples because in any Indian's mind there is no family member who would agree to carry a child for a blood relative with no compensation, in addition, they believe that a poor relative could easily be persuaded into becoming a surrogate against her will, and still not get paid for her physical and emotional labour (*Asia Times*, November 4, 2016; *Huffington India*, July 25, 2017).

Chayanika Shah, an author and activist of women's rights movement in India indicates that the government's conservative and paternalistic nature in their expectation of women only assisting infertile couples they are genetically related to is because these women believe in the 'Indian ethos' where it is expected of women to sacrifice for their families (*Kafila Online*, September 2, 2016). In any case, these women were already providing these altruistic services to their husbands, thus it is only an extension of familial labour (*Kafila Online*, September 2, 2016). The Indian government it

seems, as Shah articulates it quite nicely, view a woman's reproductive potential as underused for simply bearing children for her husband, and thus the extended family might as well benefit from the labour of this woman, especially for those married couples who have been together for the stipulated five years and struggling to have a child of their own. Other feminist groups such as The All India Democratic Women's Association (AIDWA) have blamed the government for being conservative in their approach and expressed discontent with this clause of "altruistic" surrogacy being open only to married couples. AIDWA and other activist groups have stood behind the groups that are excluded from the Bill and contend that the current notion of family in India needs to progress enough to broaden this familial privilege of reproductive labour, to others who may not be able to carry forward the family name (Kafila Online, September 2, 2016).

Shah questions this conservative notion of 'altruism' over commercial surrogacy, and suggests that the way in which the stigma against commercial surrogacy is expressed, resonates with the sentiment "how dare women make a profit using that which they have been providing for free or in exchange for respect...and a good family name and of course love!" (Kafila Online, September 2, 2016). These issues tend to surface only in examples where there is some commercial use of sexual or reproductive labour. When questions surrounding exploitation are raised, especially, in the context of reproductive and sexual labour, they seem to be painted with a moralistic interpretation of how women should use their bodies and remain within the confines of what is deemed acceptable in society (Kafila Online, September 2, 2016).

As I pointed out earlier, the exploitation that exists in commercial surrogacy is not limited to this sphere and as journalist and human rights activist of *The Wire* online newspaper, Parijata Bhardwaj writes, "altruistic" surrogacy arrangements may also be coercive in nature and may very well be present even in familial ties, so - the absence of money does not necessarily eliminate the exploitative component from the arrangement (The Wire, August 31, 2016). Gita Aravamudan, author of "Baby makers: The Story of Indian Surrogacy" also concedes that the exploitation of surrogate mothers is likely to continue in "altruistic" settings, for instance, a rich childless couple with a poor relative can easily blackmail them emotionally and force them into carrying their child for money, and questions once more, how anyone can guarantee that this supposed close relative will be treated well (The NEWS Minute, August 25, 2016).

### *3.3 Homosexuals and live- in couples*

Surrogacy as evidenced in the chapter so far, presents rather complex challenges to customary concepts of "the family". Despite being a continuous focus of legal disputes, ARTs have accelerated cutting-edge paths for the new forms of family. Homosexuals and live-in couples that have been excluded by the Bill do not seem to fit the Indian government's heteronormative patriarchal notions of what constitutes a 'normal' family. It looks as though the perfect Hindu-nationalist citizen-body is

based on the segregation of those who represent supposedly deviant sexuality and gender (Birenbaum-Carmeli, 2009:190). Heteropatriarchal notions of family prescribed by the government implicitly relate to the preservation of the sanctity of marriage and it seems that live-in couples go against the purity of matrimony by wanting to raise children outside the confines of marriage (Birenbaum-Carmeli, 2009).

One of the most controversial aspects of the draft Bill is the BJP government's barefaced ban on homosexual couples from commissioning surrogacy. The draft Bill has infuriated several LGBT activists like Gourab Ghosh for instance, and labelled it a 'homophobic legislation' (The NEWS Minute, August 25, 2016). It is a first for the extreme right-wing party to convey its homophobic views and sentiments in such a manner. Gita Aravamudan concedes that provided Article 377 of the Indian Penal Code is still in existence: allowing gay couples to access surrogacy services will remain a figment of one's imagination (The NEWS Minute, August 25, 2016). Feminist and author Malavika Ravi is perhaps accurate to infer that since it is heterosexual couples that can get married, the targeting of same-sex couples suggests two things: firstly, the government's censorship of non-procreative sex, and secondly, the government emphasising the notion that same-sex couples have no place in the Indian society (Feminism in India.com August 31, 2016). Therefore, the improper Hindu man (the homosexual) under the scope of Hindu nationalism is perceived as "anti-national, sexually immoral, Westernised and personifies physical and mental attributes as feminine in contemporary bilingual elite discourse apprised by Western ideas of gender and sexuality" (Bacchetta, 1999: 150).

A Delhi University Professor Aakriti Kohli suggests that the discriminatory clauses in this Bill originate from a very narrow, patriarchal heteronormative understanding of family and believes that the legislation needs to be revisited. Himadri Roy, a professor at the Indira Gandhi National Open University admits that commissioning a baby for same-sex couples is a far cry when the government does not even accord legitimacy to such relationships (The NEWS Minute, August 25, 2016). Roy believes that same-sex couples are not any different from heterosexual couples, as both can be good or bad parents, but rather it is dependent on the individuals themselves.

It is not just homosexuals who have been excluded in this Bill: live-in couples too will not be allowed to benefit from this 'altruistic' surrogacy. The Surrogacy (Regulation) Bill 2016 which clearly stipulates that only Indian couples who are legally married (man and woman) for five years can access altruistic surrogacy arrangements discriminates against non-heteronormative relationships and places a premium on marriage, nuclear family and genetic essentialism (Boomlive.India August 29, 2016). Ashok Row Ravi in his article in The First Post detects the government's refusal to recognise the diversity of family with the draft Bill's exclusion of live-in couples and single people as a means of keeping them out of reach of parenthood through the surrogacy route (SIFY News, August 29, 2016). Dhamini Ratnam, in an opinion piece in the *Livemint* online paper indicates that the Bill seems to

benefit only one kind of family- those that are built on the typical heterosexual marriage and anyone who falls outside these parameters is earmarked for special and distinct denouncement (Livemint, August 25, 2016). In denying live- in couples and other single individuals' access to surrogacy, the Indian government is in fact expressing its desire to uphold conservative family structures and ancient parenting notions, it is also a demonstration of progressive nationalisms that enable and yet contain the realities of modern India. And as Anuradha Sharma, a journalist with The Diplomat online paper echoes, that "it's a pity, though, that an otherwise welcome legislation to regulate an exploitative business becomes a tool for government to further its socially conservative agenda" (The Diplomat, August 31, 2016). Ultimately, then the Bill has a very specific way of imagining its intervention into the 'exploitation' of commercial surrogacy.

One of the existing images produced by new reproductive technologies is that of the 'altruistic woman'. In the book, *Reconstructing Babylon: Women and Technology*, Janice Raymond makes the claim that the tenet of 'altruism' makes women's inequality noble (1990). For instance, third party agents procure the services of surrogates who are most likely economically dead-ended, and depict them as women who have a 'special gift' to carry to term another's child. "Altruistic" surrogacy arrangements are portrayed more so as 'the greatest gift a woman can give' (Raymond, 1990:86). Few note that the 'altruism' of non-commercial surrogacy still underpins the fact that women are breeders or simply maternal containers for others, whether it is paid for or done out of "love" (Raymond, 1990:86). The potential for surrogates' exploitation does not necessarily diminish simply because no money is required and can even be found in a family environment. Family has not necessarily been a trusted sanctuary for women (Jorgensen, 2000: 39). The 'altruistic' population in this realm of new reproductive technologies is restricted to women. Women are repeatedly expected to be donors of services that are gendered and to take care of the world. Women are encouraged to carry babies for others and to present their wombs in innumerable ways just so other people can create families of their own. Surrogacy broadens conventional ideas of reproduction and asks that we interrogate the purpose of biology in the creation of family ties (Raymond, 1990:87).

This final section of the study explores what the Indian government has coined "altruistic surrogacy" which appears to dictate appropriate notions of kinship, heteronormative views of sexuality, and a legislation that is deeply patriarchal yet seeks to protect and save women from exploitation found within the transnational commercial surrogacy business. It discusses 'altruism' - a problematic concept that is gendered, the bearing it has on surrogate mothers, and then question if 'altruistic surrogacy' should be considered an alternative means of protecting surrogate mothers from exploitation, or will it produce paradoxical effects that solidify a patriarchal culture. It also closely examines what I describe as the paradox of patriarchy- whereby states introduce policies and legislation meant to protect women from potentially exploitative situations within commercial surrogacy arrangements, which is also noticeable in trafficking, migration, and sex work where



women as a population group are controlled and managed for their own 'betterment' - it raises serious questions, particularly juridical interventions in the name of 'saving' and 'protecting' women and upholding their rights, while this mode of power ends up doing just the reverse and instead advances a patriarchal agenda.

### 3.4. "*Altruistic surrogacy*" – *For love or money?*

In what follows I try to focus more precisely on the classification of 'altruistic surrogacy' and how the Bill (and more broadly speaking) distinguishes the same from commercial surrogacy. What does the insertion of this distinction mean not only for the surrogate mother but for the nation's wider regulation of women's bodies, the heteropatriarchal family and finally, the nation-state that is racialised, sexualised, and ethnicised in certain ways? This first section of the chapter, which examines the mobilisation of "altruistic surrogacy", seeks to provide a more nuanced, dense and possibly more original study of the conceptions of motherhood, kinship and nation that underlie this notion and why the state regards it as necessary for women to be 'altruistic' but not commercial donors.

Gender presents an especially constructive lens through which to explicate the activities of the nation state and of religious and ethnic societies. Amrita Basu (cited in Jeffrey & Basu, 1998:4) asserts that in the South Asian setting, the nation is depicted as a 'motherland' and the state as the 'father'. According to Basu, in some instances, the patriarchal state exerts control with benevolent paternalism as much as totalitarian authority (1998). The paternalistic state, Basu argues, extends security to "its" women and children under the presumption that they are incapable of protecting themselves and in exchange for this protection; the state dictates control over women's sexuality (cited in Jeffrey & Basu, 1998:5). Ritu Menon's (1996) identification of the state as abductor during the post-partition era of India sheds light on the paternalism of the state. Women at the time, exercised freewill in deciding who to marry when the territorial boundaries were in flux, but after the separation of Pakistan and India, the Indian government assumed the post of provider and protector as well as determining where women and children belonged. The interference of the state time and again complements, maintains and underpins the interests of patriarchal societies by belittling the efforts of women to detach themselves from society's discipline. Menon's study of "abducted women", in the post-partition era makes known that whilst the Indian government expressed its secular characteristics; in reality it spelt out membership within the national body on religious outlines (Menon, 1996: 120).

The anxiety in India over the Social Reform movement regarding widow immolation, widow remarriage, as well as the age of consent was actually concerned with women's sexuality (Bacchetta, 2002: 956). The intent behind this movement was to remove it from the purview of the traditional and introduce it into the social and political agenda of modern nationhood (Bacchetta, 2002: 957).

However, the initiative was thwarted from the beginning by the well-defined boundaries of private (symbolised as female and traditional) and public (characterised as male and modern), along with the desire to reinforce the purity and cultural supremacy of Indian womanhood (Menon cited in Jeffrey & Basu, 1998: 16). The emancipation of women was identified as a hallmark of modernity by nationalist movements whose changes were supposed to serve as a measure for social progress. The rhetoric of modernity, nevertheless, could not be deserted by the modernising state: as it was compelled to undertake the kind of change that would allow it to mould a nation, create a people that acknowledged its counterparts as part of the same nation (Ray, 1999). Even so, Deniz Kandiyoti claims that the definitions of “modern” occurs in a political arena where particular identities are privileged even though equality is assured whilst others are inferior (1991a:434-5). Each time women serve as border markers between dissimilar ethnic, national and religious collectivities, Kandiyoti claims that “their emergence as full- fledged citizens” with rights “will be jeopardised” (1991a:436). Other scholars have noted and rightly so that women have been included only figuratively into the national body politic because globally there is no nationalism that has yet given women and men equal privileged access to the resources of the nation-state (Menon 1996:131).

‘Altruism’ presumes the gift, but the gift giving relationships many a time camouflages social pressures, expectations and persuasions that drive women into believing that giving is one of their principle roles in life (Toledano & Zeiler, 2017:4). At a micro-level, there are times when a person may feel a moral obligation to make certain gifts. Most, for instance, feel a sense of duty to give bone marrow to a family member. This limited individual situation however gets extended to a social level when a giving citizenry has been socialised to give as part of their responsibility (Anleu, 1990:70). The way desires get converted into needs is a study in and of itself. Desire transforms into a need that is backed by an ethics of altruism. Focusing on altruism romanticises and in turn disguises the systems in which women are exploited by the new forms of reproductive technologies (Raymond, 1990: 90-1). More importantly, however, this reproductive altruism relies almost solely on women as donors of reproductive alms- women who have been taught culturally and historically to place the interests of others before their own. The desires of those who are infertile thus increasingly come to rest upon the bodies of certain women. This does not suggest that women are not able to give if they choose to, but it is to state that such issues are not clear- cut. However, it suggests that this “altruistic” platform women are put by the reproductive technologies is another means of exalting women’s discrimination (Jorgensen, 2000: 44).

It is often assumed that the woman who chooses to be a surrogate carrier has free will, but is she genuinely free, from the monetary burdens in commercial surrogacy, or from emotional burden found non-commercial surrogacy? Since, in most of cases, the primary motivation is money, commercial surrogacy has been likened to prostitution– it is perceived as ‘dirty’ work (Rotabi & Bromfield, 2012:133). In both instances the woman’s body is treated as a commodity (Ber, 2000: 161).

According to Rosalie Ber, the few instances where ‘supererogatory’ (altruistic) motivation for gestational surrogacy exists have taken place when a mother or sister or friend offers to carry a baby for daughter, sister or friend respectively (2000). The term ‘supererogatory’ alludes to that which is beyond the call of duty, so that even in the case of one sister being the gestational surrogate for another sister, one needs to be certain that there is no emotional coercion involved within the family, before labelling the gestational surrogacy – ‘supererogatory’ (Ber, 2000: 162).

The Western society does not support the selling of non-renewable organs, yet they accept the commercialisation of renewable tissues like blood (Cameron & Hoffenberg, 1999: 724). Why are we so infuriated when someone sells their kidney to settle a debt but have so much admiration for an altruistic donation of a kidney from a father to his son, or a sibling to sibling? Is it because an altruistic donation of a kidney is portrayed as a supererogatory act? This act could be the outcome of emotional family pressures and one could as easily see gestational surrogacy not only as ‘wombs for rent’ but as temporary organ donations. Which begs the question, why then is the sale of a lung or kidney frowned upon, yet the commercialisation of a womb is socially acceptable? There are those in many feminist movements who would comprehend this as a demonstration of the moral dichotomy of the patriarchal society in which we find ourselves (Ber, 2000: 163). On the contrary there are some feminists who firmly express disapproval of gestational surrogacy and all kinds of medically – assisted procreation and other reproductive methods. They identify gestational surrogacy as confirmation of the exploitation of women by men as well as the patriarchal society we live in (Ber, 2000: 164).

Pat Anthony, a forty-eight-year-old woman in 1987 became a surrogate carrier for her daughter and birthed triplets in South Africa. The obstetrician, Doctor Bernstein, made an interesting remark: “We feel that what Pat Anthony has done for Karen is the acceptable face of surrogacy...There was no payment, no commercialism. It was an act of pure love” (Raymond, 1990:8). Philosopher Janice Raymond in her critique of the consequences of an altruistic ethos, in surrogacy especially, contends that non-commercial surrogacy need not be dealt with as a mere gesture of altruism - as any valorising of non-commercial surrogacy should be evaluated in a broader scope of women’s political disparity (1990:7). Raymond succinctly puts it that a supererogatory act ends up becoming the ‘ethical’ yardstick for a favourable valuation of non-commercial surrogacy. She believes that ‘gift-giving’ is also besought to cushion the monetary aspect of commercial surrogacy (1990: 8). Those critical of commercial surrogacy have directed a great deal of their attention to the ethical economic exploitation of the women entering surrogacy arrangements, impoverished women that are desperately in need of money. From this bird’s eye view, the moral objection is limited to aspect of the cost tied to that which should not be bought. Thus, the result is that non-commercial surrogacy is ethically and lawfully fitting. The world we live in is one where majority of the self-sacrifices performed at the

behest of humanity are by women, but the notion of a special need to be altruistic is a male propagated ideology (Raymond, 1990:9).

A man has license to chase his selfish desires, and to do whatever is necessary to achieve them, and in the instance of surrogacy it has been excused, as necessary to continue one's lineage and biological desire. It invokes complex questions regarding the ethical double standards in a traditional environment whereby men dictate the rules women should adhere to, in which inequity is deeply entrenched and where men benefit from their own subservience (Arditti, cited in Jetter, Orleck & Taylor, 1997:328). Altruism has been a powerful tool in shaping social organisation and forms of relation in the lives of women. The societal relationships framed around reproductive gift-giving are behind the dominant drivers that tie women to traditional roles and expectations. Family outlook may not necessarily pressure a woman to carry a baby for a close relative. Nevertheless, where family bond is solid, the power of kinship beliefs could be overwhelming that it demands a reproductive gift from another woman who is a relative. Furthermore, depicting the surrogacy contract as a sacrifice holds her ransom to the demands of the family, regarded as charitable to a close member in need of it. Amongst family, it could be viewed as self-centred, unsympathetic or even dishonourable for a woman to deny a relative the opportunity of becoming a mother through her gestating abilities or providing her eggs (Baker, 1996:43-44). The scope of self-sacrifice itself is broadened in kinship situations to comprise of different non-traditional procreative 'obligations' that could be looked at disapprovingly if women got paid for it. A noteworthy aspect is that within these families an infertile woman may be considered selfish if she deprives her spouse of offspring by not permitting the services of a female relative's reproductive capabilities, more so if the surrogacy agreements remain in the household. There is a high probability that those with little bargaining power will be obligated to be altruistic within family settings. As in the case of Alejandra Munoz, a poor illiterate twenty-year old Mexican woman who was illegally immigrated into America, to be inseminated by her cousin's husband. Alejandra had been requested by a family member to "help" under the pretence that it was only going to be an "ovum" transfer, however after the insemination and a month later into the pregnancy, she was informed that the embryo transfer could not be conducted and that she would have to carry to term. She went on to sign an agreement which stated she would be paid fifteen hundred dollars to continue with the pregnancy. Upon her signing, the infertile couple went on to add a clause, "I will give up my rights to the baby" (Arditti, cited in Jetter, Orleck & Taylor, 1997:326-7).

It is not just that the ethics of 'altruistic' surrogacy that is of importance here but also recognising the difficulties of navigating between intimacy and economic activity. The commodification of women's reproductive labour or rather what Eileen Boris and Rhacel Salazar Parrenas (2010) refer to as *intimate* labours- be it sex work, care work or domestic work, or in the context of surrogacy "womb" work- creates such profound uneasiness as it opens the door to the broadening of the marketplace into the intimate and private scope of reproduction and sexuality (Pande, 2010b). The assumption

underlying such concerns is that whilst manual labour may be traded, the reproductive labour of women is essentially not meant to be commodified (Pande, 2014:7). Viviana Zelizer writes that the pervasive belief that money corrupts intimacy hinders our capacity to illustrate and clarify how money, power and intimacy really interact (Zelizer, 2006:305). She is quick to add that many scholars who look closely at intimate relationships and economic activity often become confused about these issues. She highlights that numerous observers believe that any dilution of intimate relationships with economic transactions undoubtedly corrupts the relations, and that incursion of commercial activities by intimate relationships taints those activities as well (Zelizer, 2006:306). What such views fail to recognise, Zelizer argues, is how often intimate relations can exist alongside financial transactions without necessarily being negatively affected by either one (Zelizer, 2006).

Elizabeth Roberts suggests a modified version of this argument that the economy and kinship are two spheres that overlap only awkwardly within discourses of “modern bourgeois respectability”<sup>3</sup> (Roberts cited in Birenbaum–Carmeli &Inhorn, 2009: 119). Roberts, in an ethnographic study of the exchange of eggs as material resources between Ecuadorian kinswomen argues that to sustain this respectability, it is ideal for love, family and the home to by no means mix with the corrupting power of money, trade and the market (cited in Birenbaum–Carmeli &Inhorn, 2009: 119). As economic production exited the home, reproduction and women’s labour gradually became domesticated, privatised and separated from the contamination of money as the home became the source of dignity and the marketplace the maker of value (Roberts cited in Birenbaum–Carmeli &Inhorn, 2009:120). This distinction between the spheres of family- marketplace, private-public, value-integrity, subject-object, has spread globally and now heard in human rights discourses in opposition to human trafficking and repeatedly in conflict with local understandings of dowry, bride wealth death payments (Keane 2002; Strathern, 2005). The probability that a person, a woman especially, could control or make use of what should remain her private reproductive prospect in the industry of surrogate motherhood or trading her ova collapses the two spheres of kinship and commerce in this instance (Blakely 1983; Ragone 1994). It comes as no surprise then that sale ova donation has been prohibited in some countries and still being disputed in others (Steinberg, 1996).

One cannot isolate altruism from historical events, norms, and the political systems that consolidate the injustices of women’s reproductive capacities within different societies. These self-less reproductive relationships should be observed holistically and not be viewed as women assisting other women to bear children. Janice Raymond (1990) and Sharyn Anleu (1992) maintain that the variance that exists between commercial and altruistic surrogacy is that it is a social construct and in principle

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<sup>3</sup> Note that the term ‘bourgeois’ is used here in the meaning developed by Karl Marx, to represent the dominating class that emerged in the 18<sup>th</sup> Century and imprinted societies with values that came to signify respectability, among them the distinction between love and money.

the latter represses women under the semblance of a ‘moral celebration’ of their altruism (cited in Pande, 2014: 173). In reality “altruistic surrogacy” arrangements will probably flourish in India in the face of the BJP’s conservative and puritanical judgmentalism, religious nationalism, caste and class differences and the gendered landscape of the reproductive technologies which underline the utilisation and oppression of the bodies of women to satisfy patriarchal objectives- the manly desire to create a genetic bond (Pande, 2014: 150).

### 3.5. *The ‘paradox of patriarchy’*

In this last section, I will examine what I have termed the ‘paradox of patriarchy’ – through which we have observed the BJP led-government introducing legislation that is supposedly meant to protect women from potentially exploitative situations within commercial surrogacy arrangements by championing for “altruistic surrogacy” which it believes will preserve the cultural ‘ethos’ of the Hindu nation. There are several relevant examples across the world in which states and non- state actors have advocated for legislation involving different cases like human trafficking, migration, and sex work in which we see women as a population group being controlled and managed for their own ‘betterment’. However, the paternalistic tropes that the state seems to employ through legislation to justify the policing of women’s reproductive rights, cements the paternalism towards non-procreative sex by ensuring that undesirable subjects are criminalised to maintain the decorum of society. It appears that - the ruling BJP government organises its citizens in a way that can be described both as authoritarian and as paternalistic, - a regime that is determined to preserve the traditional hetero-patriarchal notions of family through, paradoxically, the claim that it is ‘protecting’ women from exploitation.

Anthropologist Emily Martins views technology and patriarchy as mutually producing a “depersonalised mother machine being manipulated to efficiently produce babies out of a valued sperm” which ties quite nicely with a similar critique by Barbara Rothman in which technology and patriarchy intersect to subjugate women in such a manner that surrogate mothers become producers and inexperienced workers on a reproductive assembly line (cited in Rothman, 2000: 6, 34). The fixed and gendered identities have for a long time been distinguished as the quintessence of the unequal and patriarchal division of labour whereby the notion of labour is earmarked for men’s profitable labour yet the women’s role in (re) production ends up being about their biology and nature (Pande, 2015: 256). In order for us to challenge this uneven distribution of labour it is crucial that the act of giving life and raising children be recognised as a willed social function – and should be appreciated as work (Mies, 1986).

Nancy Fraser puts it quite clearly; that “a feminist critique that is simply a defensive project that seeks to protect women’s reproductive labour from the sphere of market” is both lacking and unacceptable (cited SAMA 2012:29). By classifying commercial surrogacy as labour, susceptible like any other

form of labour to exploitation, and concurrently identifying the women as workers, *Wombs in Labor* by Amrita Pande obfuscates the representation of the victim that is inexorably conjured up each time bodies of Third World women are in the spotlight (Pande, 2014:8). Kajsa Ekman, a Swedish author and social commentator, contrasts surrogacy to prostitution in her book *Being and the Commodity*, and provides a critique of what she surmises is the neoliberal imperative to ‘ban the victim’ in both trades (cited in Pande, 2014:9). The elimination of the victim is purportedly a move toward normalising inequalities between social statuses and sexes. By making the argument that commercial surrogacy in India is a new form of labour and those surrogate mothers are indeed workers and not simply victims, does not imply that one is ignorant of the various forms of inequality in this type of labour. We cannot refute that the limited scope of a surrogate mother’s alternative economic prospects and the uneven power relations between the client and the surrogate raises doubts concerning the ‘charitable’ nature of this labour (Jorgensen, 2000: 54). However, instead of writing of the labour market as intrinsically repressive and the women involved as subordinates of this dictatorial and patriarchal system, it is important to acknowledge, validate and methodically assess the decisions that women make to participate in the market (Pande, 2014:9-10). Alison Bailey warns against a narrow-minded focus on ‘choice’, as she holds that it “occidentalises Indian surrogacy work and obscures the injustices behind these choices” (Bailey, 2011:722). A thorough assessment of these choices reveals the multiple overlapping layers of domination that have a bearing on them.

It is within these more complex arrangements of choice, agency, and so-called “victimhood” that explicitly “humanitarian” projects which seek to ‘save’ and ‘protect’ women must be located. Scholarship on the operations of power within the humanitarian politics of ‘rescue’ highlights a predicament at the epicentre of the surrogacy regulation Bill, that is, how policies and legislation in the name of defending women and supporting their rights – and how these reproduce women’s exclusion and exploitation. Humanitarianism, Heike Harting indicates, is “epistemologically and historically encumbered” in brutish global structures of inequality, domination and exploitation (Harting, 2008:62). Thus, it is imperative that we critically examine the seemingly utopian aspirations of the BJP government of ‘altruistic surrogacy’ in the proposed Bill as that of a ‘humanitarian strategy’ but also the effects created, directed and channelled through it as a benevolent act, as well as the potential effects on the body politic as whole. Conversely, underlying the BJP government’s supposedly “modern” political aspirations lurk some incredibly puritanical, traditional notions of the women’s place (Basu cited in Jeffrey & Basu, 1998:13), making its particular politics of women’s ‘rescue’ potentially politically pernicious.

In advocating for “altruistic surrogacy” as a ‘humanitarian strategy’, - the Indian government through implementing this Bill seeks to enforce patriarchy, govern and regulate sexuality, and the reproductive rights of women. It reproduces a conservative gendered regime which does not actually address the economic plight of the surrogate mothers who are benefitting from commercial surrogacy, the needs

of infertile single, live- in and married couples as well as same- sex couples who have been excluded from Hinduised notions of family. Instead, it re-asserts, under the claim to be protecting Indian women put at risk by an exploitative global commercial surrogacy market, the very need for a patriarchal ‘protectionism’ of women who otherwise have agency and capacities of their own. The BJP government’s usurpation of the role of protector of women presumably at risk of exploitation by the market of commercial surrogacy, re-entrenches women’s subordinate position rather than empowering them, or recognising that they exercise forms of power in ways that make them potential feminist subjects. In this way, the state indeed works to blunt the feminist political aspirations of the would-be surrogate women, incorporating as them beneficiaries of the state’s patriarchal governance project. In seeking to save ‘women’ the Indian state subordinates them further.



## Conclusion: The Uncertainty of “Altruistic Surrogacy”

This research project explored the proposed legislation to ban commercial surrogacy in India and an analysis of the ongoing debates and contestations in the Indian context. The scope of this project focused on the rather problematic categorisation of “altruistic surrogacy” which raises some critical questions on how the Bill distinguishes it from commercial surrogacy.

I examined what the insertion of this ‘altruistic’ distinction signals not only for the surrogate, but also for India’s extensive regulation of women’s bodies, the patriarchal ideas of kinship and subsequently, a nation-state that is sexualised, ethnicised, and racialised in various ways. As a result, the research offers an in-depth reading of the use of “altruistic surrogacy” in the Bill and elsewhere to provide a more nuanced, condensed and possibly unique interpretation of the conceptions of motherhood, kinship, and nation underlying this notion, and why the Hindutva government regards it as appropriate for women to be gift-givers but not commercial donors.

The move towards “altruistic surrogacy” by the government suggests an urgent need to curb the exploitation of women of and children within commercial surrogacy, but as my analysis shows, it may be the ambiguity and indignity surrounding labour markets like commercial surrogacy or sex work which reflect the state’s apprehensions over women encroaching on the margins between reproduction and production, and between non-market and market. These fears are embedded in the functioning of these markets, so it is difficult to identify labour as being completely removed from matters of morality (Pande, 2014:106-7, 2016).

The political context in which the Bill has been proposed and the debates that are unfolding, has also been a focal point in this project. Both currents- neoliberal globalisation and Hindu nationalism - represented by the extreme right-wing party the BJP government (and its conservative notions on gender and sexuality most evident in its hostility to decriminalising homosexuality) also shape the political landscape in India and have a direct bearing on the policies and legislations when it comes to the governance of sexuality and gender (Dasgupta, 2014). As stated earlier, in a neoliberal model, market-oriented considerations creep into the sphere of politics and governance, and reconstruct the link between the governing and governed. It is evident in the case of India, where a state’s neoliberal policies affect lives, the rights of citizens, and ethics in a globalised world at a much faster rate (Bharadwaj cited in Birenbaum- Carmeli & Inhorn, 2009:241). Neoliberalism and Hindu nationalism share quite similar ideas of the correlation between the state, society and individual. However, the tension arises in that neoliberalism celebrates individual freedom, which contradicts with its nationalist rhetoric of Hindutva wherein the individual subordinates to the society (Bacchetta, 1999). Here we see that the Indian government’s nationalist agenda has created an ‘Other’ who has been excluded from the Hinduised notion of family, and so they find themselves having to bargain for inclusion into the body politic. What we have is a government that is driven by neoliberal capitalist

ideas on the one hand, but also instilling the image of a true Hindu on the other (Gopalakrishnan 2006:2806). One would think that the neoliberal thinking of individual freedom that the Hindu extremist ring-wing party has us believing it subscribes to does not actually include homosexuality but has shown ignorance towards non-procreative sex. Homosexuality as I pointed out is illegal under Article 377 of the Indian Penal Code. Perhaps the values of the Indian culture that External Affairs Minister Swaraj refers to as “our ethos”, as it stands today is not prepared to embrace homosexuals and live- in couples, thereby prohibiting them from commissioning surrogacy services (Bhattacharyya, 2016: 16).

More theoretically, I looked at how women, as a population group are managed and controlled for their own ‘good’ and that of the body politic as a whole. I saw it as a type of paternalistic approach that we find in other studies like sex work and migration for instance, which raises questions about the governance of certain subjects for particular affects or effects, especially humanitarian ones in the name of ‘saving’ and ‘protecting’ gendered suffering (Jorgensen, 2000: 46). This body of literature brings out a predicament that appears to be at the focal point of the criticisms about the Bill, namely, how legislations and policies meant to protect and defend their rights wind up doing just the reverse. The Indian government assumes the role of protector in proposing a Bill that urgently seeks to curb the exploitation of women and children but does not address any of the surrogate’s needs, instead its utopian aspirations seem to do more harm than good. These women engaging in commercial surrogacy do not have other viable options of making money, so depriving them of this source without a sustainable solution except “altruistic surrogacy” as an alternative that is also riddled with exploitation is no remedy to the problem they are trying to fix (Jorgensen, 2000:48). Instead this law seems to be a state tool for enforcing patriarchy, regulating sexuality, and reproducing a normative gendered regime. Contrary to the utterances made by the concerned government and ministry, the current structure of the Bill does not seem to incorporate all sections of society and neither does it serve the greater interests of that society.

The study has uncovered through non-mainstream and independent media the wide-ranging media debates around the Bill. There are feminists who agree with the state that transnational commercial surrogacy is exploitative and that it provides cheap wombs for the global north and thus welcome the ban on commercial surrogacy (Toledano & Zeiler, 2017:4). On the other hand, some feminists concede that it is an exploitative industry, however, an outright ban on commercial surrogacy is not only unrealistic but also undesirable in that it would drive the industry underground, or push it into neighbouring countries, whilst this “altruistic surrogacy” is at play only further stigmatises the profession and the women involved (Toledano & Zeiler, 2017:5). By acknowledging the exploitative nature of surrogacy- does not suggest that women lack agency in utilising the resources that they possess as strategies of survival. Of importance however is the need to recognise the limitations on women’s choice and agency within surrogacy arrangements and demands the regulation of an existing

industry that bends over backwards to cater for the needs of the socially advantaged groups. Putting surrogacy and ARTs, and other forms of intimate labour, within the spectrum of reproductive labour may be an initial stride toward envisioning a larger population of women with shared interests (Pande, 2014:186).

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